

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )

Request for Review of the Decision of the )  
Universal Service Administrator by )

The Albuquerque School District )

Federal-State Joint Board on )  
Universal Service )

CC Docket No. 96-45

Changes to the Board of Directors of the )  
National Exchange Carrier Association, Inc. )

CC Docket No. 97-21

REQUEST FOR REVIEW OF THE DECISION OF THE  
UNIVERSAL SERVICE ADMINISTRATOR BY  
THE ALBUQUERQUE SCHOOL DISTRICT

MODRALL, SPERLING, ROEHL, HARRIS  
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## SUMMARY

The Albuquerque Public School District ("APS") requests Commission review of the March 24, 2003, Funding Commitment Decision Letter issued by the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC"). The SLD denied funding because it believed APS' Form 470 did not allow for competitive bidding on major new initiatives. Contrary to the allegations contained in the SLD's denial of funding letter, the services requested were competitively bid. The State of New Mexico has, through a competitive procurement process, obtained pricing agreements for use by all branches of the state government (state agencies, local public bodies, school districts, etc.) and APS, after complying with Commission rules on submitting and posting FCC Form 470, was able to use one of the selected vendors to achieve cost-effective and cost-efficient acquisition of quality products and services needed to implement its technology plan. There was no bidding violation. Additionally, APS' requested funding is not designed to implement any "major new initiative." Rather, the requested funding is needed to implement the next step in APS' five year Technology Master Plan, pursuant to which the SLD had previously granted funding.

That APS' request for funding was not granted while substantially similar requests from other districts around the country were granted is unjust and unwarranted. APS' students should not be deprived of much-needed technology assistance simply because the SLD misunderstands state and local procurement practices. If the SLD has now decided to reject previously accepted competitive bidding practices, its new standard should be clearly articulated and applied only prospectively. The ad hoc, retroactive prohibition that the SLD has decided to place on APS unfairly prejudices some of the nation's poorest students.

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**REQUEST FOR REVIEW OF THE DECISION OF THE  
UNIVERSAL SERVICE ADMINISTRATOR BY  
THE ALBUQUERQUE SCHOOL DISTRICT**

The Albuquerque Public School District ("APS"), pursuant to Section 54.719 of the Commission's rules, hereby submits its Request for Review of the Universal Service Administrator's decision denying the following funding requests: FRN 856741, 856765, and 856797.

**I. FACTUAL BACKGROUND**

APS is the largest school district in New Mexico, with over 85,000 students. APS serves some of the poorest children in the country, as demonstrated by the fact that, of its 85,000 students, roughly 22,500 are located in schools eligible for 90% discounts based on poverty levels and urban/rural status. The Federal Communications Commission ("FCC") established the Schools and Libraries Funding Mechanism (the "E-Rate program") in 1997 to provide

financial support to school districts like APS for purchasing Internet access, internal connections, and telecommunications services.

Schools within APS participated in the E-Rate program on an individual basis during the first three years of the program's existence.<sup>1</sup> In the fall of 2001, APS consolidated its technology planning and developed an instructionally-focused district-wide Technology Master Plan. As a result of adopting the district-wide plan, APS moved to a single, coordinated, district-level application, as opposed to isolated, uncoordinated applications by individual schools. Adopting a district-wide technology plan resulted in a 10-fold increase in funding to the district and to individual schools for the 2001-2002 funding year.<sup>2</sup> Having received E-Rate funding pursuant to its technology plan to wire its schools in Year 4, APS submitted a Year 5 application that requested services to implement the next phase of its technology plan. After posting a Form 470 on the Schools and Libraries Division ("SLD") website and locating a vendor to provide the requested services, APS applied for discounts under the E-Rate Program.

In March of this year, the Universal Service Administrative Company-Schools and Libraries Division ("USAC-SLD") issued a letter denying the requested funding. Each funding request was denied because "Applicant [APS] did not identify the specific services sought – either clearly on the 470 or in the RFP – to encourage full competition on major new initiatives."<sup>3</sup>

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<sup>1</sup> The total funding received by individual schools within APS during the first three years is as follows: 98-99 (\$890,950), 99-00 (\$478,939), 00-01 (\$1,385,441).

<sup>2</sup> APS received \$13,782,235 in funding for the 2001-2002 year pursuant to its technology plan.

<sup>3</sup> See March 24, 2003 USAC-SLD Letter Denying Funding (attached as Exhibit "A").

## **II. THE ALBUQUERQUE PUBLIC SCHOOL DISTRICT SELECTED THE MOST COST-EFFECTIVE PROVIDER TO IMPLEMENT THE SERVICES CALLED FOR IN ITS TECHNOLOGY MASTER PLAN THROUGH A COMPETITIVE BIDDING PROCESS THAT FULLY COMPLIED WITH FCC, SLD, AND STATE REQUIREMENTS**

The SLD indicated in its funding denial letter and in conversations between SLD personnel and APS staff that the denial of funding was based on the misimpression that this procurement represented a major new initiative by APS for which it failed to conduct a sufficiently competitive procurement process. As is set forth in the following paragraphs, this characterization is inaccurate and uninformed. The procurement is not a “major new initiative” but an incremental step in implementing APS’ technology plan and deploying the facilities needed to obtain Internet access in APS classrooms. In addition, APS fully complied with state and APS procurement law and rules and FCC regulations by conducting a competitive procurement, which was also in accordance with state and local procurement rules.

### **A. This Is Not A “Major New Initiative”**

APS is not attempting to fund a major new initiative. Rather, APS is trying to sustain an ongoing program designed to provide appropriate technology services to its students. Contrary to the assertion in the SLD’s denial of funding letter, the APS’ Year 5 application did not include any “major new initiatives.”

APS has in place what it refers to as its Technology Master Plan (“TMP”).<sup>4</sup> The TMP was developed with input from the individual APS schools by the APS Technology staff.<sup>5</sup> The TMP, which is 70 pages long, was published and approved by the Board of Education of APS on September 21, 2001. The TMP, as adopted in 2001, was designed to “facilitate implementation of technology, in a strategic fashion, throughout the district in support of student achievement

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<sup>4</sup> See APS’ TMP (attached as Exhibit “B”)

<sup>5</sup> See Affidavit of Maureen Davidson (attached as Exhibit “C” ¶ 2)

and enhanced life and work skills.”<sup>6</sup> APS asked the voters to approve a \$117.6 million General Obligation Bond and a \$74.8 million Two-Mill Levy in February 2002. Almost \$50 million of which was to be used to accelerate the needs identified in the Technology Master Plan. A copy of one piece of promotional literature for the election is included.<sup>7</sup> Unfortunately the voters turned down the General Obligation Bond and Mill Levy request.<sup>8</sup>

Section 5 (“Technology Infrastructure”) of the TMP sets forth APS’ master plan for creating the needed framework for achieving the aforementioned technology-based goal.<sup>9</sup> The wiring of classrooms and schools with internal connections was one of the specific projects called for in the TMP (project ID TI-4).<sup>10</sup> Pursuant to the TMP, APS’ Year 4 application contained funding requests intended to provide wiring for APS’ 41 poorest schools. This request was funded in the amount of \$13,782,235. After obtaining funding to wire these classrooms with internal connections, the Year 5 application (the subject of this appeal) followed the TMP and requested funding for support infrastructure to ensure stable, safe, and secure network connectivity in those 41 schools.<sup>11</sup>

Moreover, APS is unaware of any Commission rule or regulation establishing additional requirements for “major new initiatives,” as the term is found nowhere in the FCC’s rules or orders. Nor is there any mention of “major new initiatives” on the SLD website or within its instructions. When asked about this, the SLD indicated that this language (on which the denial of funding to APS was based) stemmed from an FCC ruling in a matter involving the Brooklyn

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<sup>6</sup> See APS’ TMP, pp. 1-2 (Message from Thomas Ryan, Executive Director for Technology)

<sup>7</sup> See Election Promotional Material (attached as Exhibit “D”)

<sup>8</sup> See Affidavit of Maureen Davidson (attached as Exhibit “C” ¶ 4(d))

<sup>9</sup> See APS’ TMP, § 5, pp. 36-43.

<sup>10</sup> See APS’ TMP, pp. 41, 58.

<sup>11</sup> See APS’ TMP pp. 41, 59 (Project TI-5).



Public Library.<sup>12</sup> However, a review of that decision plainly shows that not only does the phrase “major new initiatives” not appear anywhere within the FCC opinion, but the holding and analysis in the opinion is wholly irrelevant to the situation presented here. The issue addressed by the Commission in *Brooklyn Public Library* was whether a telecommunications carrier could recover in the first year of a multi-year contract all of the capital investment that would otherwise be recovered through recurring charges over the life of the contract. The Commission held that an attempt to recover as an up-front charge in the first year of a multi-year contract all of the capital investment to be made by a telecommunications carrier that would otherwise have been recovered through recurring charges over the life of the contract would have constituted an impermissible “advance payment” or “prepayment.”<sup>13</sup> No such charge or recovery mechanism is contemplated by the APS application.

In denying APS’ request for funding based on the alleged inclusion of “major new initiatives,” the SLD has violated its duty to enforce the Commission’s rules and has instead engaged in impermissible rulemaking of its own. In compliance with an explicit Congressional directive that USAC be limited to implementation of the FCC rules,<sup>14</sup> the Commission has emphasized that SLD (as a division of USAC) can perform only administrative functions and may not “make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”<sup>15</sup> Indeed, SLD is “prohibited from making decisions of law or policy” and must limit its activities “to implementing existing rules and policies established by the Commission.”<sup>16</sup> But SLD’s “major new initiatives” standard for APS’ application has no precedent in

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<sup>12</sup> Request for Review of the Decision of the Universal Service Administrator by Brooklyn Public Library, Brooklyn, New York; Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 15 FCC Rcd 18598 (2000) (“*Brooklyn Public Library*”).

<sup>13</sup> *Id.*, ¶ 15.

<sup>14</sup> See Conference Report on H.R. 3579, H.R. Rept. No. 105-504, 105<sup>th</sup> Cong. 2d Sess.

<sup>15</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 13 FCC Rcd. 25058, 25067 (1998)..

<sup>16</sup> *Id.*

Commission rules or orders. Moreover, even if Commission rules *did* prohibit “major new initiatives,” there is no attempt to fund a major new initiative here since the funding requested in APS’ Year 5 application is needed and designed to take the next step in implementing APS’ TMP. Furthermore, the services requested in APS’ Form 470 all fall within the scope of APS’ TMP. As demonstrated, APS is engaged in no major new initiative, nor does SLD have any authority for denying funding on this ground.

**B. The Services Requested In APS’ Form 470 Were Competitively Bid**

Under the schools and libraries universal service support mechanism, eligible schools may apply for discounts on eligible telecommunications services, Internet access, and internal connections.<sup>17</sup> The Commission’s rules require eligible schools and libraries to seek competitive bids for all services eligible for discounts.<sup>18</sup> In order to comply with this competitive bidding requirement, an applicant must first submit to the Administrator a completed FCC Form 470 setting forth the applicant’s technological needs and listing the services for which it seeks discounts.<sup>19</sup> APS complied with this requirement and the Administrator posted the Form 470 on its web site where all potential service providers could view and consider it.<sup>20</sup> Once the Form 470 has been posted for 28 days and the applicant has signed a contract for eligible services with a service provider, the applicant must then submit a completed Form 471 application to notify the Administrator of the services that have been ordered, the service provider, and an estimate of the funds needed to cover the discounted portion of the price of the eligible services.<sup>21</sup> After APS’ Form 470 had been posted for at least 28 days, it submitted a Form 471 that provided all

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<sup>17</sup> 47 C.F.R. §§54.502, 54.503.

<sup>18</sup> 47 C.F.R. § 54.504.

<sup>19</sup> 47 C.F.R. § 54.504(b)(1), (b)(3).

<sup>20</sup> See APS’ Form 470 (attached as Exhibit “E”).

<sup>21</sup> 47 C.F.R. § 54.504(c).

required information.<sup>22</sup> Nevertheless, despite APS' compliance with the Commission's rules, its funding requests were denied. As discussed more fully below, this denial was improper.

Pursuant to the Commission's rules, the aforementioned "competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements."<sup>23</sup> In New Mexico, public entities are required by the Procurement Code to use a competitive process for all purchases of goods and services. N.M.S.A.1978, §§ 13-1-102 to 122. The New Mexico Office of the State Purchasing Agent, in an effort to maximize savings and get the lowest possible prices, allows for entities such as the Western States Contracting Alliance ("WSCA") to take the place of individual government procurement procedures. New Mexico was the lead state for WSCA and has approved pricing agreements for use by all branches of the New Mexico state government, state agencies, and local public bodies, including public schools such as APS.

The pricing agreements approved by the WSCA for computer equipment and services were obtained through competitive source selection procurement. Fully consistent with the Procurement Code of the State of New Mexico, the WSCA solicitation sought vendors that could provide information technology goods and services directly from the manufacturer, thereby yielding the lowest possible cost per unit. To more completely trace the competitive bidding method that is the subject of this appeal, APS will set out the process in detail.

The WSCA was formed in 1993 by fifteen Western State purchasing directors. The purpose of the WSCA's formation was for states to join together to achieve more cost-effective

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<sup>22</sup> See Funding Commitment Decision Letter referencing Form 471 Application Number 320461.

<sup>23</sup> 47 C.F.R. § 54.504(a).

and cost-efficient acquisition of quality products and services. Since its inception, over three billion dollars worth of purchases have been made through the WSCA.<sup>24</sup>

The WSCA's initial procurement request for computer equipment and services was advertised with a Public Notice distributed by the states of Colorado, Idaho, Nevada, New Mexico, and Utah.<sup>25</sup> The initial RFP was issued on May 26, 1999, and the 62-page Amended RFP was issued on June 16, 1999. New Mexico received over 2000 "hits" to its website during the course of this procurement process. The RFP set forth the specifications sought and laid out the competitive bidding process.<sup>26</sup> On June 24, 1999, the WSCA finalized the RFP by publishing the evaluation methodology to be used for the subject procurement.<sup>27</sup>

In response to the Public Notice and RFP, twenty (20) different companies submitted proposals for evaluation to the WSCA. Eighteen (18) of those companies were deemed to have submitted responsive proposals, based on their responses to the criteria set forth in the RFP.<sup>28</sup> The purchasing agents of Colorado, Nevada, New Mexico and Utah then conducted the evaluation process based on the aforementioned Collaborative Evaluation Methodology. The 18 companies submitting responsive proposals were evaluated and eight companies were selected as finalists.<sup>29</sup> The finalists were then asked to submit best and final offers by August 23, 1999. The finalists made oral presentations and demonstrations during the week of August 24-27, 1999. The four evaluating state representatives met with the New Mexico Purchasing Director on August 27, 1999 to discuss the evaluation results and cast their votes for award.<sup>30</sup> Based on the companies' respective scores, the Evaluation Committee unanimously recommended that, of the

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<sup>24</sup> See WSCA's webpage [www.state.nm.us/spd/WSCAmain.html](http://www.state.nm.us/spd/WSCAmain.html) (relevant portions attached as Exhibit "F").

<sup>25</sup> See Public Notice (attached as Exhibit "G").

<sup>26</sup> See Amended RFP (attached as Exhibit "H").

<sup>27</sup> See Collaborative Evaluation Methodology (attached as Exhibit "I").

<sup>28</sup> See List of Companies Submitting Responsive Proposals (attached as Exhibit "J").

<sup>29</sup> See List of Companies Selected as Finalists (attached as Exhibit "K").

<sup>30</sup> See Evaluation Charts One & Two (attached as Exhibit "L").

eight finalists, the five highest ranked companies should be awarded price agreements effective September 3, 1999 through September 2, 2004 (Compact, CompUSA, Dell, Gateway, and IBM).<sup>31</sup>

Included in these price agreements were additional, predetermined discount percentages to be applied to subsequent purchase prices after cited cumulative sales volume levels were reached. Stated another way, once the cumulative sales volume (from the 15 WSCA states) passed certain "trigger points," additional price discounts would apply from that point forward. The success of these price agreements exceeded all expectations and all applicable discounts were triggered very early on. According to Michael C. Vinyard, State Purchasing Agent for New Mexico, the prices available under the WSCA agreements are the lowest available anywhere in the country.<sup>32</sup>

The FCC rules and regulations provide that "eligible schools, libraries, and rural health care providers seeking discounted services or reduced rates should be allowed to purchase services from a master contract negotiated by a third party."<sup>33</sup> In fact, allowing school districts like APS "to order eligible telecommunications services from a master contract negotiated by a third party is consistent with [the FCC's] goal of minimizing universal service costs and therefore is also consistent with 47 U.S.C. § 254(h)(1)."<sup>34</sup> Thus, funding should not have been denied simply because APS ordered services from a vendor who had entered into a pricing agreement with the WSCA.

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<sup>31</sup> See List of Companies Awarded Price Agreements (attached as Exhibit "M").

<sup>32</sup> See Vinyard E-mail Memorandum Attached to Correspondence from Michelle M. Lewis, Coordinator Educational Technology Fund (attached as Exhibit "N").

<sup>33</sup> See *Federal-State Joint Board on Universal Service* (Fourth Order on Reconsideration), 13 FCC Rcd. 5318, 5452 ¶ 232 (1997)

<sup>34</sup> *Id.*

As demonstrated, the WSCA procurement process was extremely thorough and competitive. However, the competitive bidding process did not end there. In December 2001, APS submitted a Form 470 that was posted on the SLD's website (Application Number: 559770000394437). Information regarding the nature and scope of APS' requested services, as set forth in its Form 470, was available to all potential service providers, who were all able to access information about APS' technology needs. The ability of APS to benefit from the pricing agreements reached as a result of the WSCA's competitive procurement process, coupled with APS' strict compliance with the Commission's competitive bidding rules, ensured that the principles of competitive neutrality so highly valued by the FCC and SLD were implemented.<sup>35</sup>

Following APS' posting of its Form 470, IBM submitted draft Statements of Work ("SOW") with regard to the internal connection services requested by APS. After negotiations between APS staff and IBM, a final SOW was agreed upon.<sup>36</sup> IBM also submitted a SOW for network cabling. Although APS rejected IBM's offer to provide network cabling (local vendors had already been selected to provide these requested services), APS awarded the other contracts to IBM based on IBM's pricing, as set forth in their WSCA-approved Price Agreement Terms and Conditions, Model Participating Addendum, and IBM Products and Price Schedule (all documents are available for public viewing on the WSCA website at: <http://www.state.nm.us/spd/wsca94151.html>), prior experience, qualifications, and the quality of their SOWs. Importantly, since IBM was one of the 5 companies awarded a price agreement through the aforementioned WSCA procurement process, APS was able to maximize savings and obtain services at some of the lowest prices available in the country.

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<sup>35</sup> See Federal-State Joint Board on Universal Service, Order on Reconsideration, CC Docket No. 96-45, 12 FCC Rcd. 10095, 10098, ¶ 9 (1997).

<sup>36</sup> See Affidavit of Maureen Davidson, (attached as Exhibit "C").

Pursuant to FCC regulations, the procurement methods employed by APS complied with all applicable rules on competitive bidding, including local and state regulations. New Mexico received over 2000 “hits” to its website during the course of the procurement. As indicated, 20 different companies submitted proposals, 18 of which were deemed responsive. From those 18 companies, 8 were selected as finalists. From the 8 finalists, 5 were awarded price agreements. APS then posted its Form 470, which was available to all potential vendors and service providers for bidding. All potential bidders were treated equally, and none had advance knowledge of the information contained in the Form 470. Nor did APS maintain any improper relationships with service providers prior to the competitive bidding process that would have unfairly influenced the outcome. In the end, IBM was the only vendor who submitted a responsive proposal for the services requested in APS’ Form 470. After a thorough review by APS, the SOWs were accepted based on the criteria set forth in the Commission’s regulations. Therefore, funding should not have been denied on this basis.

**C. The Decision To Deny Funding To APS Was Arbitrary And Capricious, Given That Other School Districts’ Funding Requests Were Granted Based On Nearly Identical Form 470 Summary Descriptions**

The USAC-SLD denial of funding letter also states that APS’ funding requests were denied because APS’ 470 failed to “clearly” describe the “specific services” it was seeking. (The denial letter also referred to “the RFP” when there was none, other than those released as part of the WSCA process described above.) Specifically, the SLD told APS that it had filed an “encyclopedic” Form 470 that requested a broad array of services, rather than specific services. To the extent the description of services provided in its Form 470 played a role in funding being denied, SLD’s denial of funding on this basis was arbitrary and capricious, given the fact that

SLD has repeatedly granted funding to other school districts that used either substantially similar or much broader service descriptions in their Form 470s.

APS' Form 470 requested the following internal connection services for 130 buildings: wiring (Cat3, Cat5, coax, fiber, conduit, wiring accessories); routers, servers, switches, hubs, and upgrades; PBX, KSU, ARS, console, components, and upgrades, voice compression module, VIC, VoIP; video CODEC, MCU, MPEG encoder, PVBX, video group and desktop equipment, EMMI; maintenance/installation, technical support, documentation, extended warranty; wireless service, LAN; video equipment (broadband amplifier, cable box and modem); ATM equipment (edge device, EMMI); hardware and upgrades for internal connections (CSU/DSU, antenna, tape backup, line sharing device, media converter, modem, monitor, multiplexing, satellite dish, TA, terminal server, UPS, zip drive, DIMM, transceiver); internal connections components (backup power supply and batteries, cabinets, and power strips, circuit card, Ethernet card, graphics card, hard disk array controller, RAID, MAU, NIC, SNMP module, multiport serial card); operational software and upgrades, e-mail software, client access licenses, programming and configuration charges; construction costs, contingency fees, leasing fees, professional services, per diem, travel time.<sup>37</sup>

A review of Form 470s from other school districts reveals that several districts, whose requests for funding *were* granted, submitted virtually identical descriptions in their Form 470s.<sup>38</sup> For instance, both the Houston Independent School District ("Houston") and the San Francisco Unified School District ("San Francisco") submitted Form 470s with nearly identical

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<sup>37</sup> See APS' Form 470. (attached as Exhibit "E").

<sup>38</sup> Given the Albuquerque School District's inability to review *all* Form 470s submitted by schools, school districts, consortiums, and libraries around the country (there were 1580 Form 470s submitted by school districts in California alone during the relevant funding period), only a representative sample of what is presumably hundreds of school districts is included in this letter for comparison purposes.



descriptions of the internal connections for which they were requesting funding.<sup>39</sup> For the SLD to deny funding to APS based on the specificity of its service descriptions is entirely arbitrary and capricious given the SLD's decision to grant funding to both Houston and San Francisco, who submitted nearly identical Form 470s with nearly identical service descriptions.

Additionally, SLD approved funding for a number of school districts whose Form 470s contained much broader and less specific service descriptions than APS. The Denver School District 1 ("Denver"), the Kansas City School District ("Kansas City"), and the St. Louis City School District ("St. Louis") all submitted Form 470s with much broader descriptions of services than the Form 470 submitted by APS.<sup>40</sup> For example, whereas APS specified the 5 types of wiring it would need, Denver's Form 470 simply requested "internal wiring."<sup>41</sup> Similarly, whereas APS specified the types of video equipment that it would need, Denver simply requested "video equipment."<sup>42</sup>

In fact, although APS provided summary descriptions of each requested service, Denver, Kansas City, and St. Louis all submitted Form 470s with mere one or two word references to the services being requested. All were unarguably broader than APS' Form 470. The inconsistent and discriminatory treatment of APS is even more glaring when its Form 470 is compared to that of the Los Angeles Unified School District ("Los Angeles").<sup>43</sup> Los Angeles simply listed individually in alphabetical order the same functions and services that APS grouped together in line items. Nevertheless, Los Angeles' request for funding was granted.

Though APS has included just a few examples of the relative breadth of the services requested by the various schools, a cursory review of the Form 470s identified indicates that the

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<sup>39</sup> See Houston and San Francisco Form 470s (attached as Exhibits "O" & "P").

<sup>40</sup> See Denver, Kansas City, and St. Louis Form 470s (attached as Exhibits "Q", "R", and "S").

<sup>41</sup> See Denver Form 470.

<sup>42</sup> Id.

<sup>43</sup> See Los Angeles Form 470 (attached as Exhibit "T").

services requested by APS were as well or better defined than those of other schools who were granted funding. The summary description of services requested found in the Form 470s of Denver, Houston, Kansas City, Los Angeles, San Francisco, and St. Louis were all deemed sufficient for the requested funding to be granted. However, despite the fact that APS' description of the services requested was either as narrow or narrower than those of other schools whose funding requests were granted, its funding requests were denied. To the extent the decision to deny APS' requests for funding was based on the purported inadequacy of the summary description found in its Form 470, this criterion appears to have been arbitrarily and capriciously applied only to APS, as the funding requests of numerous other school districts were all granted based on equally broad or broader Form 470s. The "law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated."<sup>44</sup> Just as "[t]here may not be a rule for Monday, and another for Tuesday," there may not be one rule applied only to APS and another for Denver, Houston, Kansas City, Los Angeles, San Francisco, and St. Louis.<sup>45</sup>

### III. CONCLUSION:

As illustrated, APS' funding requests did not involve any major new initiatives. Rather, the requests were made (1) as incremental implementation of a pre-existing technology plan; and (2) in order to build on the foundation established by the previous year's funding. Moreover, the funding requests were based on procurement processes that fully complied with the FCC's rules on competitive bidding. The contracts for the funding requests were awarded based on the responses provided to APS' request for services in its Form 470. Because of the pricing

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<sup>44</sup> Mary Carter Paint Co. v. Federal Trade Com., 333 F.2d 654, 660 (5<sup>th</sup> Cir. 1964), rev'd on other grounds, 382 U.S. 46 (1965).

<sup>45</sup> Id.

agreements reached by the WSCA's competitive procurement process, APS was ultimately able to obtain high quality internal connection services at a greatly reduced cost.

Additionally, APS' applications were treated differently by the SLD, as its description of the services (for which funding was denied) was substantially similar, if not identical, to requests made by other school districts whose requests for funding were granted. The SLD's arbitrary and capricious decision has effectively deprived students in APS of much-needed technology assistance. APS fully complied with all competitive bidding requirements. Unfortunately, the SLD appears to have chosen to disregard state and local procurement requirements and practices as well as its own precedent. If the SLD has now decided to reject previously accepted and widely used competitive bidding practices, its new standard should be clearly articulated and applied only prospectively. To apply this new standard inconsistently and without warning unfairly prejudices some of the nation's poorest students. As such, APS requests that the Commission reverse the SLD's decision to deny funding to the Albuquerque Public School District.

Respectfully submitted,

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Albuquerque, New Mexico 87103-2168  
Telephone: 505.848.1800

**CERTIFICATE OF SERVICE**

I, Arthur D. Melendres, hereby certify that true and correct copies of the preceding Request for Review of the Decision of the Universal Service Administrator by the Albuquerque School District was served this 23rd day of May, 2003, by hand delivery to the following parties:

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Vistrionix, Inc.  
236 Massachusetts Avenue, N.E.  
Suite 110  
Washington, D.C. 20002

D. Scott Barash  
Vice President and General Counsel  
Universal Service Administrative Company  
2120 L Street, N.W.  
Suite 600  
Washington, D.C. 20037

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS  
& SJISK, P.A.

By: Arthur D. Melendres

Arthur D. Melendres  
Alex C. Walker  
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**DOCUMENT AVAILABLE  
IN THE LEAD  
DOCKET/RULEMAKING**

SEE DOCKET NO. *96-45* FOR THE DOCUMENT.